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IN THE

Supreme Court of the United States

October Term, 1962

NO. 329

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*

v.

LEE B. THOMPSON, TRUSTEE, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	14
APPENDIX A—Opinion and Judgment of the Court of Appeals	15
APPENDIX B—Statutes	26

CITATIONS

CASES

Nottebaum v. Leckie, 31 F.2d 556 (3rd Cir. 1929)	12
Noxon Chemical Products Co. v. Leckie, 39 F.2d 318 (3d Cir. 1930)	12, 13
Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (4th Cir. 1902)	12, 13

CONSTITUTION AND STATUTES

Fifth Amendment, United States Constitution	2, 26
28 U.S.C., Section 754	3, 7, 26
28 U.S.C., Section 1335	3, 27
28 U.S.C., Section 2001	3, 7, 11, 28
28 U.S.C., Section 2361	3, 29

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To The Honorable Earl Warren,
Chief Justice of The United States,
And The Associate Justices Of The
Supreme Court Of The United States:

Petitioner, Arkansas Louisiana Gas Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause May 17, 1962.

Opinions Below

The order of the District Court (R. 29-33) is reported in 30 F.R.D. 181; it did not deliver an opinion upon the

rendering of such order. The opinion of the Court of Appeals (R. 97-102) is reported in 303 F. 2d 129. The opinion and judgment of the Court of Appeals are set out in full in Appendix A, infra, pp. 15-25.

Jurisdiction

The judgment of the Court of Appeals was entered on May 17, 1962. (R. 97, 103) The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254(1).

Questions Presented

1. Whether, in this interpleader suit, the members and creditors of an unincorporated association are necessary parties, where the permanent receiver and ancillary receiver of such association have been made parties, if the appointments of such receivers are void for lack of due process required by the Fifth Amendment of the United States Constitution.

2. Whether a judgment in this interpleader suit will be binding upon the members and creditors of an unincorporated association who are not parties hereto, where the permanent receiver and ancillary receiver of such association have been made parties, if the appointments of such receivers are void for lack of due process required by the Fifth Amendment of the United States Constitution.

3. Whether an appointment by a federal district court of a permanent receiver of an unincorporated association without service of citation on or notice to the members and creditors of the association, other than the defendants who organized it, is void for lack of due process required by the Fifth Amendment of the United States Constitution.

4. Whether subsequent proceedings had after service of notice by mail and publication to the members and creditors of an unincorporated association, thirty years after the appointment by a federal court of a permanent receiver of the association, cured any invalidity of his appointment by reason of lack of service of citation on and notice to the members and creditors of the application for such appointment.

Statutes Involved

The pertinent constitutional provision is the Fifth Amendment of the United States Constitution; the pertinent statutes are 28 *U.S.C.*, Sections 754, 1335, 2001 and 2361; and all such provisions, together with the volume and page where each may be found in the official edition, are set out in Appendix B, infra, pp. 26-29.

Statement

This interpleader suit was brought by Petitioner under 28 U.S.C., Sections 1335 and 2361, to determine the ownership of a portion of the proceeds of gas and condensate produced from a natural gas unit located in Panola County, Texas. (R. 4) Necessary to a determination of the ownership of such proceeds is an adjudication of the title to an undivided ¼ mineral interest in a 184-1/4 acre tract described in the designation of said unit as being included therein. Petitioner purchases the gas and condensate produced from the unit well, which is located on another tract in the unit, and is obligated by written contracts to pay the owners therefor. (R. 4-6)

In addition to numerous other defendants who own or claim royalty or mineral leasehold interests in said unit, Petitioner named as defendants herein more than 500

parties who constitute members of the Organization Board of Universal Oil and Gas Company ("Universal"), which was never incorporated, investors in or shareholders of Universal and creditors of said Board and said Universal, and who are all of the parties known to Petitioner who have or claim an interest in said Board or its assets or in Universal or its assets. (R. 2-3) Such parties are hereinafter for convenience collectively called the "Universal Claimants."

Two of the defendants, Lee B. Thompson, Trustee, and E. H. Patton, Jr., Ancillary Trustee, filed a motion that the District Court enjoin and prohibit Petitioner from causing process in this case to be served upon the Universal Claimants. In such motion said Trustee and said Ancillary Trustee alleged that they had been duly appointed under orders of the United States District Court for the Western District of Oklahoma (hereinafter sometimes referred to as the "Oklahoma Federal Court") and the United States District Court for the Southern District of Texas, respectively, as trustees, and in substance as equity receivers, of the Organization Board and Universal Oil and Gas Company, with the duty and authority to take possession and preserve any interest which the Universal Claimants may have in the property involved in this case; that they as such trustees fully and adequately represent all interests of all of the Universal Claimants herein; that, therefore, the Universal Claimants are not necessary or proper parties to this lawsuit; and that service of process on the more than 500 Universal Claimants would unnecessarily increase the costs of this litigation which might be charged against the interpleaded funds. (R. 2-3, 20) The trial court, after a full hearing in open court, by its order of October

5, 1961, held the Universal Claimants not to be necessary or proper parties, granted said motion and enjoined Petitioner from causing process herein to be served upon the Universal Claimants. (R. 3, 20, 25-33) An interlocutory appeal from such order under 28 *U.S.C.* Section 1292(b), was taken to the Court of Appeals (R. 95), which affirmed the trial court. (R. 97, 103)

The agreed facts giving rise to the questions presented herein are as follows. The Organization Board, prior to November 7, 1929, and thereafter, engaged in selling shares or trust certificates convertible into shares of a corporation proposed to be organized under the name of "Universal Oil and Gas Company" to purchasers or investors throughout the United States and other countries. Such corporation was never organized, and said investors or purchasers of shares, together with the members of said Organization Board, have never constituted anything other than an unincorporated association of the name, "Universal Oil and Gas Company." (R. 6-7)

By deed dated November 7, 1929, the Organization Board purported to acquire all of said undivided ¼ mineral interest in said 184-1/4 acres. Thereafter, on May 7, 1930, R. F. Hodson (an investor or purchaser of shares) filed a suit, recited to be on behalf of himself and others similarly situated, in the Oklahoma Federal Court (hereinafter called the "Oklahoma Suit") against the members of the Organization Board doing business as such board of Universal for the appointment of a receiver of the assets of said Board and of Universal and for other relief. On the same day, May 7, 1930, the Oklahoma Federal Court, in the Oklahoma Suit, appointed Fred P. Branson temporary receiver of all of the properties of the defendants in said suit and of Universal without

notice to any of the Universal Claimants other than those who were members of said Organization Board; and, on May 10, 1930, also without notice to any of the Universal Claimants other than those who were members of said Organization Board, said Fred P. Branson was appointed permanent receiver of all of the "properties of the defendants herein doing business as the Organization Board or Syndicate of the Universal Oil and Gas Company, including any and all properties of said company." (R. 7-8) Said receiver did not at any time qualify in any State or Federal Court in the State of Texas as receiver of any of the properties located in Texas, including said 184-1/4 acres, and did not institute proceedings for the appointment of an ancillary receiver in Texas for such properties, but dealt with them as though he had jurisdiction to do so. (R. 8-9)

On September 19, 1932, said Fred P. Branson filed his final report as receiver in the Oklahoma Suit. By order dated September 20, 1932, the Oklahoma Federal Court approved said final report of said Fred P. Branson, Receiver, discharged him, and appointed said Lee B. Thompson (hereinafter sometimes called the "Oklahoma Trustee"), as "Trustee to take title to the royalty properties now in the name of the Receiver" described in said order, including such interest as said Fred P. Branson, Receiver, may have acquired or had control of in said 184-1/4 acres. Even though the Oklahoma Federal Court purported to appoint said Lee B. Thompson as "Trustee," the effect, if any, of such order was to appoint said Lee B. Thompson an equity receiver of the assets and properties of said Organization Board and of Universal. (R. 9-10)

This order of September 20, 1932, was entered after notice of the hearing of the application therefor to the

members of said Organization Board and such of the creditors of said Board who had filed claims with the receiver, but without notice to any of the other Universal Claimants. (R. 10)

Purporting to act under the authority of an order dated November 26, 1951, in the Oklahoma Suit, said Oklahoma Trustee executed an oil, gas and mineral lease purporting to cover by its terms all of said undivided 1/4 mineral interest in said 184-1/4 acres. (R. 11) Respondents Mollet and Dickerson, claiming under a deed executed by said Fred P. Branson as receiver, also executed oil, gas and mineral leases purporting to cover all or part of said undivided 1/4 mineral interest. (R. 12-13) Said leases were later assigned to Respondent Imperial Production Corporation, which with others created said gas unit purporting to include all of said 184-1/4 acres. (R. 14)

No ancillary receiver or trustee was appointed by any court in the State of Texas to take custody and control of any of such assets and properties located in the State of Texas until the United States District Court for the Southern District of Texas appointed an ancillary trustee of said 184-1/4 acres in 1960 as is hereinafter described. And, the Oklahoma Trustee had not qualified as trustee or receiver of any properties located in Texas in accordance with the provisions of 28 U.S.C., Section 754. (R. 10-11) Moreover, said order of November 26, 1951, was entered without notice to any of the parties to the Oklahoma Suit and said lease was executed and delivered at a private sale, without notice to any party to the Oklahoma Suit or the other Universal Claimants, without the prior appointment and report of appraisers, without any publication of its terms and without being confirmed by an order of said Oklahoma Federal Court as required by 28 U.S.C., Section 2001. (R. 11)

On or about January 15, 1958, H. A. Kroeger, one of the defendants in said Oklahoma Suit and a defendant in this cause, filed in the Oklahoma Suit a motion to dismiss the case and to wind up and dissolve the receivership, or trusteeship, of the Oklahoma Trustee in the Oklahoma Suit and for the distribution of the assets held by the Oklahoma Trustee to the parties entitled thereto. On January 16, 1958, the Oklahoma Trustee filed his answer to said motion to dismiss and his application for authority to institute proceedings for the appontment of an ancillary trustee or receiver in the State of Texas. On the motion of the Oklahoma Trustee, by order dated January 16, 1958, the Oklahoma Federal Court set said motion to dismiss and said application for authority to institute ancillary proceedings for hearing on February 27, 1958, and ordered that service of notice of said hearing on said motion to dismiss and said application be made (I) upon the complainant, each defendant, and all creditors who had filed claims or intervened in the Oklahoma Suit, by mailing to such parties, at their last known addresses, copies of said motion to dismiss, said answer and application for ancillary proceedings, said order and a form of notice, not less than twenty days prior to said date of February 27, 1958, and (II) also, upon all such parties and all other persons interested in the subject matter of the Oklahoma Suit, in said Organization Board or in its assets, in Universal or in its assets, or in said undivided ¼ mineral interest in said 184-¼ acres, and upon the heirs, legal representatives and successors of each of such parties and persons, by publication in a newspaper of general circulation in Oklahoma City, Oklahoma, at least once a week for a period of four consecutive weeks prior to said date of February 27,

1958. Service of notice was made by publication and mailing in the manner and upon the parties required by said order dated January 16, 1958. On said date of February 27, 1958, said motion to dismiss filed in the Oklahoma Suit and said application for authority to institute proceedings in the State of Texas for the appointment of an ancillary receiver or trustee came on for hearing. By order of February 27, 1958, the Oklahoma Federal Court in all things overruled said motion to dismiss and ordered the receivership, or trusteeship, in the Oklahoma Suit continued. By such order, said court also granted authority to the Oklahoma Trustee to institute proceedings in the United States District Court for the Eastern District of Texas for the appointment of an ancillary receiver to take charge of all assets of said Organization Board and Universal located in the State of Texas. (R. 15-17); but such authority was never implemented by institution of such proceedings in said Eastern District.

On March 22, 1958, this interpleader suit was filed by Petitioner in the United States District Court for the Southern District of Texas. (R. 17) After the institution of this interpleader suit the following proceedings were had in the Oklahoma Suit. By order dated March 26, 1958, the Oklahoma Trustee was authorized to institute proceedings in the United States District Court for the Southern District of Texas, or any other United States District Court within the State of Texas, for the appointment of an ancillary receiver or trustee to take charge of all assets of the Organization Board and Universal in the State of Texas. On September 8, 1958, the Oklahoma Trustee filed an amended application in the Oklahoma Suit for authority to institute proceedings for the appointment of an ancillary trustee or receiver to take charge.

custody and control of and administer only such interest as the Organization Board, Universal and the Oklahoma Trustee, or any of them, may have in said 184-¼ acres and to intervene in this interpleader suit. In accordance with an order dated September 8, 1958, in the Oklahoma Suit, a hearing on said amended application was set for September 25, 1958, and notice of such application and such hearing was served and given by publication and by mail. At said hearing on September 25, 1958, and by order entered on such date, said amended application was granted and the Oklahoma Trustee was authorized to institute proceedings in the Southern District of Texas for the appointment of an ancillary trustee or receiver to take charge of and administer and control such interest as the Organization Board, Universal and the Universal Claimants, and the Oklahoma Trustee, or any of them, may have in and to said 184-¼ acres. (R. 17-18)

In accordance with such proceedings in the Oklahoma Suit, in Civil Action No. 11,685, styled "In the Matter of Lee B. Thompson, Trustee, Applicant for Appointment of Ancillary Trustee," in the United States District Court for the Southern District of Texas, the Oklahoma Trustee filed an application for the appointment of an ancillary trustee or receiver and thereafter, on November 20, 1958, an amended application for the appointment of an ancillary trustee or receiver. Said amended application was set for hearing on December 23, 1958, and notice of such hearing was given as ordered by the court. Thereafter, by agreement of all interested parties and as ordered by the court, said hearing on said amended application was continued from time to time until February 8, 1960, on which date said amended application was heard. By order dated February 8, 1960, the court appointed E. H. Patton, Jr.,

"Ancillary Trustee," but actually ancillary receiver, of such interest as the Organization Board, Universal, the Universal Claimants and the Oklahoma Trustee, or any of them, may have in said 184-1/4 acres. Said F. H. Patton, Jr., thereupon filed his bond as ordered by the court and duly qualified as such Ancillary Trustee, and entered an appearance in this interpleader suit. (R. 18-19) Then, pursuant to orders of the District Court, and in compliance with 28 *U.S.C.*, Section 2001, the Ancillary Trustee, executed an oil, gas and mineral lease covering said undivided 1/4 mineral interest to Respondent Imperial Production Corporation, and subject to such lease, conveyed an undivided 1/4 of said undivided 1/4 mineral interest to each of Respondents Mollet and Dickerson. (R. 19-20)

Thereafter, the Oklahoma Trustee and the Ancillary Trustee filed their motion to prohibit Petitioner from serving process upon the Universal Claimants. On October 5, 1961, the District Court entered the order granting said motion (R. 20), and on May 17, 1962, the Court of Appeals affirmed the District Court's order. (R. 97, 103)

Reasons For Granting The Writ

1. Petitioner is admitted in the agreed statement of facts to be a neutral stake holder with no interest in the subject matter of this interpleader suit other than to be protected from a multiplicity of suits and from double or multiple liability by a final judgment binding upon all parties who may have or claim an interest in such subject matter, including the Universal Claimants. (R. 4-6) Accordingly, Petitioner does not assert that the decision of the court below was correct or erroneous, but it does respectfully assert that this Court should determine the questions herein presented for the protection of Petitioner and the other parties to this suit.

2. The decision of the court below in the instant case and that of the Court of Appeals for the Fourth Circuit in *Universal Savings & Trust Co. v. Stoneburner*, 113 Fed. 251 (1902), are in conflict with the decisions of the Court of Appeals for the Third Circuit in the cases of *Nottebaum v. Leckie*, 31 F. 2d 556 (1929), cert. den. 280 U.S. 558, and *Noxon Chemical Products Co. v. Leckie*, 39 F. 2d 318 (1930), cert. den. 282 U.S. 841, (unless the differences in the nature or interests of the parties involved or other facts furnish valid grounds for distinction). In the *Leckie* cases, it was held that in a suit by an individual, the appointment of permanent receivers of the defendant corporation without service of process upon it or appearance by it was void *ab initio* for lack of due process and that it was not validated by a hearing upon an order directed to the stockholders and creditors of the corporation to show cause why the receivership should not be continued. On the other hand, in the instant case, the Court of Appeals held (R. 97-103) that, in a suit brought by a member of an unincorporated association on behalf of himself and all others similarly situated, a federal district court had full power and authority to appoint permanent receivers of such association, which was a party to the suit only to any extent it may have been a party through the named defendants doing business as its "Organization Board," with notice only to the members of such board and without notice to the other members of the association or its creditors and that any question as to the validity of the appointments have been cured by subsequent proceedings had after notice to the members and creditors of the association, by lapse of time, and by the prolonged failure of all parties to object to such appointments.

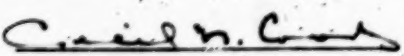
However, although probably in conflict with the *Lurton* cases, *supra*, the decision of the court below in the instant case is in accord with and supported by the *Stoneburner* case, *supra*. In the *Stoneburner* case, the plaintiffs, stockholders in the defendant corporation, brought suit against it and its directors for the appointment of a receiver and other relief. The district court, without notice, appointed a permanent receiver of the corporation, its order providing that a motion to discharge the receiver might be made on five days notice to the adverse parties. Service of process was then effected and a motion to discharge the receiver was filed by the defendants, heard by the court and overruled. The Court of Appeals held that the appointment of the receiver was valid and that, in any event, any defect therein by reason of lack of notice had been cured by the hearing on the motion to discharge.

3. The questions herein presented are important questions of federal law which have not been, but should be, settled by this Court. If appointments of permanent receivers by federal courts without notice to all interested parties are void *ab initio* for lack of due process, and therefore subject to collateral attack, and the invalidity of such appointments cannot be cured by subsequent proceedings had after notice to all interested parties, no person can deal or litigate solely with such a receiver in relation to the receivership estate, even under orders of the court of appointment, except at his peril and the risk of double or multiple liability with respect to the subject involved. On the other hand, if all parties interested in a receivership estate must be parties to all transactions and all litigation involving property or claims of the estate, the time and expense to operate an estate in receivership and to conclude litigation involving property or claims of the estate will be so exorbitant as to be prohibitive.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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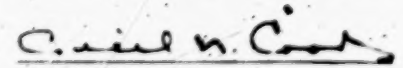
August 10, 1962

Proof of Service

The undersigned counsel for Petitioner, Arkansas Louisiana Gas Company, certifies that a copy of the foregoing petition has been served upon each of Respondents Lee B. Thompson, Trustee, Suite 2120 First National Building, Oklahoma City 2, Oklahoma; E. H. Patton, Jr., Ancillary Trustee, 1939 West Gray, Houston, Texas; Messrs. Golden, Croley, Howell, Johnson & Mizell, and Mr. Bradford D. Corrigan, Jr., 1307 Republic National Bank Building, Dallas 1, Texas, attorneys of record for the other Respondents, by depositing same in the United States mail, first class postage prepaid, addressed to them at their respective post office addresses stated above, this 10 day of August, 1962.



Cecil N. Cook
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19328

ARKANSAS LOUISIANA GAS COMPANY,
Appellant,

versus

H. A. KROEGER, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(May 17, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: This appeal brought and allowed pursuant to Title 28 U.S.C., Sec. 1292 (b) from the order of the district court dated October 5, 1961,[1] is

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[1] Arkansas Louisiana Gas Co. v. H. A. Kroeger, et al., ____ F. Supp. ____.

presented as an agreed case on appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure.

The lawsuit, as the opinion and agreed case show, is an interpleader suit brought by Arkansas to determine title to a portion of the proceeds of the production of gas and condensate from a unit located in Panola County, Texas. The bill alleged that under the terms of written contracts, Arkansas has purchased, is continuing, and will continue to purchase gas and condensate produced from said units, and Arkansas is obligated to pay, upon the terms and conditions therein set out, for gas and condensate purchased and delivered from said unit, and to pay the royalties on said gas and condensate to the owners thereof on behalf of the parties designated as the sellers in said contracts. Included within the description of the unit, as stated in its designation, is a certain tract of land of 184 - 1/4 acres, more or less, in Panola County, Texas (sometimes referred to as containing 193.98 acres of land). Arkansas purchases gas and condensate from a well which is located on another tract in said unit, and not on said 183 - 1/4 acres, more or less. The ownership of an undivided 1/4 interest in and to the oil, gas and other minerals in and under, and that may be produced from said tract of 183 - 1/4 acres, more or less, is uncertain, and Arkansas has withheld and tendered into the registry of the District Court, under its first amended bill of interpleader or in the nature of interpleader, the purchase price of that portion of the gas and condensate produced from said unit attributable to an undivided 1/4 of 183.98/643 of such gas and condensate. Such portion of such purchase price tendered and to be tendered into the registry of the district court are hereinafter collectively called the "Disputed Proceeds".

The bill further alleged that Arkansas is a neutral stake holder and has no interest in said tract of 184 1/4 acres, more or less, or in said Disputed Proceeds other than as the purchaser of gas and condensate from said unit and to be protected from a multiplicity of suits and from double or multiple payment of said Disputed Proceeds by a final judgment binding upon all necessary parties who have or claim, or may claim, an interest in or portion of said Disputed Proceeds.

In addition to numerous other defendants who own or claim royalty or mineral leasehold interests in said unit, Arkansas in its bill named as defendants herein more than 500 parties who constitute members of the Organization Board (or "Pre-Organization Board") of Universal Oil & Gas Co., investors in or shareholders of Universal Oil and Gas Company and creditors of said Board and said Universal Oil and Gas Company and who are all of the parties known to Arkansas who have or claim an interest in said Board or its assets or in said Universal Oil and Gas Company or its assets. Such parties are hereinafter for convenience collectively called the "Universal Claimants".

Two of the defendants, Lee B. Thompson, Trustee, and E. H. Patton, Jr., Ancillary Trustee, filed a motion that the district court enjoin and prohibit Arkansas from causing process in this case to be served upon the Universal claimants. In such a motion said trustee and said ancillary trustee alleged that they had been duly appointed and were acting under orders of the United States District Court for the Western District of Oklahoma (hereinafter referred to as the "Oklahoma Federal Court") and the United States District Court for the Southern District of Texas, respectively, as trustees, and in substance as equity receivers, of said Organization Board and Universal Oil and Gas Company,

with the duty, interest, and authority to take possession of and preserve any interest which the Universal claimants may have in the property involved in this case, that they as such trustees are not adversely interested to said claimants but their interests are the same as theirs, and they fully and adequately represent all interests of all of the Universal claimants herein and, therefore, the Universal claimants named and sought to be served are not necessary or proper parties to this lawsuit. The trial court, after a full hearing in open court, by the order of October 5, 1961, held the Universal claimants not to be necessary or proper parties, granted said motion and enjoined Arkansas from causing process herein to be served upon the Universal claimants. This appeal from such order followed.

This is the way Arkansas in its brief states its position:

> "Arkansas is a neutral stakeholder with no interest in said 184 1/4 acres, more or less, or the Disputed Proceeds other than as the purchaser of production and to be protected, from a multiplicity of suits and double or multiple payments of the Disputed Proceeds, by a final judgment in this case binding upon all necessary parties who have or claim or may claim an interest in or a portion of the Disputed Proceeds. If the Universal claimants are necessary parties to this case, Arkansas should not be prohibited from causing process herein to be served upon them. If they are not necessary parties, Arkansas does not desire to have them served. Accordingly, Arkansas does not affirmatively assert that the district court erred in entering the Stay Order, but submits that the question whether the Universal claimants are or are not necessary parties is not free from doubt and should be determined by this Honorable Court for the protection of Arkansas and the

other parties herein. The question presented on this appeal is whether the district court erred in holding the Universal claimants are not necessary parties to this cause and in granting the Stay Order prohibiting service of process upon them herein."

Appellees, in their brief, thus state their position:

"The question presented on this appeal is correctly stated in appellant's brief as follows: 'Whether the district court erred in holding that the Universal claimants are not necessary parties to this cause and in granting the Stay Order prohibiting service of process upon them herein'. Appellees contend that the Universal claimants are not necessary parties and that the district court did not err in granting the Stay Order.

"The Universal claimants are not necessary parties to this cause because their interests are adequately represented herein by Lee B. Thompson, Trustee, and E. H. Patton, Jr., both of whom are *equity receivers appointed for the purpose of* managing and preserving the assets of the Universal Oil and Gas Company for the rightful owners thereof and for the purpose of representing the interests of the owners in connection with such properties.

"The rule is well established that where a receiver is appointed by a Federal District Court, persons who are parties to such proceeding or who claim an interest in the assets of the receivership estate, are not necessary parties to any other proceeding to which the receiver is a party, their interests being adequately represented therein by the receiver. Further such persons are bound by a judgment rendered in any proceeding to which the

receiver is a party. Atlantic Trust Co. et al. v. Dana et al, 128 F. 209 (8th Cir., 1903); Manhattan Trust Co. et al v. Chicago Elect. Traction Co., 188 F. 1006 (N.D. Ill., 1910); Texas & Pac. Ry. Co. v. Griffin et al, 76 Tex. 441, 13 SW 471 (1890); Davis v. Gray, 83 U.S. 203, 21 L. ed. 447 (1873); Doggett v. Florida Ry. Co., 99 U.S. 72, 25 L. ed. 301 (1878); Southern Expressway Co. v. Western N.C. Railway Co., 99 U.S. 190, L. ed. 319 (1878).

"Appellant, in its brief, acknowledges the above stated rule, but asserts that the rule presupposes a valid appointment of a receiver. Appellant then suggests that the validity of the appointment of each of Lee B. Thompson, Jr. and E. H. Patton, Jr., Ancillary Trustee, is questionable, because their predecessor, Fred P. Branson, was initially appointed as receiver of the properties of the Universal Oil & Gas Co. and of the Organization Board of said company upon notice to the members of said Board but without notice to the investors, shareholders and creditors of the Board and of the Company. Appellant also points out that the original appointment of Lee B. Thompson as Trustee was also made without notice to such parties.

"Although notice is not specifically required by statute (28 U.S.C.A. 754, 959) or by rule (Rule 66, Federal Rules of Procedure), as a general rule a receiver should not be appointed without notice to the parties to be affected by the receivership. 75 Corpus Juris Secundum 704. However, a court of equity does have the power and authority to make an ex parte appointment of a receiver. 75 C.J.S. 704 and 45 A.J. 81. Central West Public Service Co. v. Craig, et al., 70 F (2) 427 (8th Cir., 1934); Tennessee Public Co. v. Carpenter, 100 F (2) 728

(6th Cir. 1938). Thus, it has been held that where the giving of notice is impracticable because the defendant has absconded or cannot be found or where the giving of notice would defeat the very purpose of the receivership, it is within the discretion of the court to make an ex parte appointment. Latimer et al v. McNeil, 142 F. 451 (3rd Cir. 1906); and Kattleman v. Madden, 88 F (2) 858 (8th Cir., 1937).

The power to make an ex parte appointment is properly exercised when the receivership is required by some urgent necessity, and whether or not such a necessity exists is a matter for the discretion of the trial court. If he acts improvidently, the appointment is irregular but not void. Tennesee Public Company v. Carpenter, supra; Friedman Oil Corp. v. Brown, 50 S.W. (2) 471 (Tex. Civ. App., 1932, n.w.h.); Yount et al. v. Fagan et al., 244 S.W. 1036 (Tex. Civ. App. 1922), motion to amend judgment denied 289 S.W. 187; Cash et al., v. Ervin, et al., 62 S.W. (2) 242 (Tex. Civ. App. 1933 n.w.h.).

'Without exception, the decisions cited in appellant's brief involve appeals taken from orders making ex parte appointments in which the contention is made that the court abused its discretion. Such is not the case in the instant suit. To the contrary, no d. ect appeal has been taken from any of the appointments here involved. Rather, appellant is now attempting to raise collaterally, in a proceeding separate and apart from the proceedings in which the appointments were made, the matter of the validity of the appointments.

"Since a court of equity has jurisdiction and power to make an ex parte appointment, such an appointment is not void and must be attacked on direct appeal as an abuse of discretion. The ap-

pointment may not be attacked collaterally in a proceeding separate and apart from that in which the appointment is made."

Raylor v. Easton, 180 F. 363. Cf. *Lively v. Picton*, 218 F. 401; *Cadle v. Baker*, 87 U.S. 650, 22 L. ed 448 (1874); *Phelps v. Mutual Reserve Fund Life Association*, 112 F. 453 (6th Cir. 1901), aff'd 190 U.S. 147; *Robins v. Sandford* et al, 29 S.W. (2) 969 (Tex. Comm. App., 1930).

Based on these contentions, appellees insist that the facts set out in the agreed case establish beyond controversy that the appointments in this case cannot be collaterally attacked and that the district judge did not err in making the order complained of on this appeal.

In addition, pointing to the facts set out in the agreed case, they insist that defects and irregularities in the appointment of Fred P. Branson as receiver and the appointment of Lee B. Thompson in the Oklahoma case have now been cured beyond the power of any person to attack those appointments, especially where as here the attack is a collateral one. Citing and relying on *Universal Savings & Trust Co. v. Stoneburner*, 113 F. 251,[2] where it was held that failure to give adequate notice in connection with the original appointment of a receiver was cured by a subsequent proceeding in which notice was given, the appellees, pointing to the great lapse of time between the original appointment of Branson and Thompson in the Oklahoma case and the fact that in subsequent proceedings in the receivership, notice was given to the

[2]Cr. Kattelman v. Madden, 88 F. (2) 858; Ferguson v. Bucks County Farms, Inc., 280 F. (2) 739; Southwell v. Church, 111 S.W. 696; Seneca Sec. Corp. v. Meddinah Athletic Club, et al., 74 F. (2) 107; and Brown B. & Co. v. Lake Superior Iron Co., 134 U.S. 530.

Universal claimants at various steps of the receivership proceedings and no complaint or attack was made, argue with conviction that the agreed case fully supports the action and order of the district judge, that in view of the long delay in attacking the receivership, even a direct attack upon the appointment of a receiver has long since been waived and is now barred by laches and stale demand, and that a fortiori the collateral attack here pressed is wholly without legal basis.

In support of these arguments, appellees, pointing to these facts which the agreed case shows:

1. These individuals failed to appeal from the appointment of Fred P. Branson in 1930 and the appointment of Lee B. Thompson in 1932.

2. With the exception of H. A. Kroeger, these persons made no attempt to vacate such appointment or in any way object to or complain of them.

3. These individuals failed to object to or complain of the receivership,

(a) when notified in connection with the 1958 hearing on Kroeger's Motion to Vacate the receivership;

(b) when notified in connection with the September, 1958, proceeding in which Thompson was authorized by the Oklahoma Court to initiate ancillary proceedings in Texas, and

(c) when notified in connection with the proceeding in the Houston District Court in which E. H. Patton, Jr. was appointed Ancillary Trustee.

4. These individuals have for some thirty-two years acquiesced in such appointments in question by totally failing to object to or complain of the receivership.

conclude that there is, therefore, no way in which the Universal claimants could now upset the receivership of Lee B. Thompson or E. H. Patton, Jr., either in the Oklahoma suit itself or in any type of collateral attack such as the one at bar.

As appellees correctly point out in their brief, appellant in its brief does not affirmatively assert that the appointment of Fred P. Branson and his successor trustees, Lee B. Thompson and E. H. Patton, Jr., are void, nor does appellant affirmatively assert that the Universal claimants are necessary parties to this interpleader suit. On the contrary, appellant acknowledges that any defect, if any, which existed in connection with the original appointments may have been cured by subsequent proceedings and admits that, if such is the case, the Universal claimants are adequately represented in this suit by Lee B. Thompson, Trustee, and E. H. Patton, Jr., Ancillary Trustee, and are not necessary parties.

In the light of the authorities above cited and many others which might be named, we find ourselves in full agreement with appellees' view, that the court in the Oklahoma suit had full power and authority to appoint Fred P. Branson and Lee B. Thompson as receivers; that such appointments and subsequent appointments cannot be questioned collaterally in this proceeding; that any defects which existed in the original appointments have been cured by subsequent proceedings, by lapse of time, and by the prolonged failure of all parties to raise objection to such appointments; that the appointments of Lee B. Thompson and E. H. Patton, Jr. were fully validated by the proceedings conducted in 1958 and 1960, and they are now, for all of these reasons, beyond question, and that the interests

of the Universal Claimants are adequately represented in this suit by Lee B. Thompson and E. H. Patton, Jr., and the Universal claimants are, therefore, not necessary parties.

The judgment appealed from is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By _____
CLARA R. JAMES, Deputy
New Orleans, Louisiana
July 24, 1962

JUDGMENT

Extract from the Minutes of May 17, 1962

ARKANSAS LOUISIANA GAS COMPANY
No. 19328 versus
H. A. KROEGER, ET AL

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Arkansas Louisiana Gas Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * *

APPENDIX B

The Fifth Amendment of the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 754 of Title 28, United States Code, Act of June 25, 1948, c. 646, 62 Stat. 923, is as follows:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.
>
> He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

Section 1335 of Title 28, United States Code, Act of June 25, 1948, c. 646, 62 Stat. 931, is as follows:

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy or insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

Section 2001 of Title 28, United States Code, Act of June 25, 1948, 62 Stat. 958, as amended May 24, 1949, c. 139, §99, 63 Stat. 104, is as follows:

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interest of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different

localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

Section 2361 of Title 28, United States Code, Act of June 25, 1948, c. 646, 62 Stat. 970, as amended May 24, 1949, c. 139, §117, 63 Stat. 105, is as follows:

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.